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No. 90-1419

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

NATIONAL RAILROAD PASSENGER CORPORATION
and
CENTRAL VERMONT RAILWAY, INC.,
Petitioners,

v.

BOSTON AND MAINE CORPORATION, *et al.*,
Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

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BRIEF OF BOSTON AND MAINE CORPORATION IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the court below properly set aside the Order of the Interstate Commerce Commission and remanded for further proceedings on the grounds that the Commission failed to make requisite findings of fact under Section 402 of the Rail Passenger Service Act of 1970, as amended, 45 U.S.C. 562 (1988), before allowing Amtrak to exercise the power of condemnation.

2. Whether the court of appeals' reversal of the Interstate Commerce Commission's Order exceeded the proper scope of review.

3. Whether the court of appeals' holding creates a conflict between the circuits as to the interpretation of Section 402 of the Rail Passenger Service Act.

PARTIES TO THE PROCEEDING

The petition at ii sets forth the required disclosure under Rule 29.1 of the Rules of this Court.

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Respondent Boston and Maine Corporation ("Boston and Maine") respectfully requests that this Court deny the petition of National Railroad Passenger Corporation ("Amtrak") and Central Vermont Railway, Inc. ("Central Vermont") for a writ of certiorari, seeking review of the District of Columbia Circuit's judgment entered on August 10, 1990, reported at 911 F.2d 743 (1990), and its Order denying rehearing entered on February 1, 1991 (App. 1a-4a).

STATEMENT OF THE CASE

Prior to 1988, Boston and Maine and Central Vermont, longtime competitors for freight rail business in New England, each owned large stretches of the Connecticut River Line, a rail line running between Springfield, Massachusetts and White River Junction, Vermont. Each had the right to operate over the other's rails in accordance with a trackage rights agreement dating back to 1930.

In 1972, Amtrak began running the "Montrealer" passenger train over this line but discontinued that service in 1987. Amtrak contended that service was discontinued due to the condition of the Boston and Maine-owned tracks which, while satisfactory for Boston and Maine's freight traffic, would not permit passenger train service at 60 miles per hour. At that point, the dispute between Amtrak and Boston and Maine centered around responsibility for the cost of upgrading the tracks, with Boston and Maine taking the position that it would cooperate in the project to upgrade the tracks provided that Amtrak agreed to pay its share of the costs associated with maintaining tracks suitable for trains traveling at 60 miles per hour.

In January 1988, Amtrak and Central Vermont entered into an Acquisition Agreement under which Central Vermont would provide funds to allow Amtrak to offer to purchase a 49-mile stretch of the Connecticut River Line from Boston and Maine. Under the Acquisition Agreement, if Boston and Maine did not accept the offer, Amtrak would file a proceeding under Section 402(d) of the Rail Passenger

Service Act of 1970, as amended, 45 U.S.C. § 562(d) (1988) ("RPSA"), to acquire the Boston and Maine property by eminent domain and thereafter convey it to Central Vermont. On March 18, 1988, Amtrak gave Boston and Maine an ultimatum. Boston and Maine could sell its portion of the Connecticut River Line to Amtrak, or Amtrak would proceed before the Interstate Commerce Commission ("Commission") with condemnation proceedings. In response to Amtrak's "take-or-leave" offer, Boston and Maine reaffirmed its desire to cooperate in the project to upgrade the tracks and expressed its willingness to submit the issue of apportionment of additional costs to a third party such as the Commission for resolution. Amtrak treated Boston and Maine's response as a rejection and promptly proceeded with condemnation proceedings under RPSA Section 402(d).

The Commission granted the application of Amtrak to condemn the 49 miles of Boston & Maine Connecticut River Line property and to reconvey that property to Central Vermont. *National Railroad Passenger Corp.*, 4 I.C.C. 2d 761 (1988). On the petition of Boston and Maine, the court below reversed the Commission's Order and remanded the case for further proceedings. *Boston and Maine Corp. v. ICC*, 911 F.2d 743 (D.C. Cir. 1990), *reh'g denied*, Nos. 88-1631 *et al.*, Order (D.C. Cir. Feb. 1, 1991) (*per curiam*). The court held that the Commission failed to make the necessary fact finding under RPSA and, further, that the Commission's construction of RPSA "is contrary to its unambiguous meaning." 911 F.2d at 753

In reviewing the sufficiency of the Commission's fact-finding, the court first found that the Commission failed to make the finding required under RPSA that

the extent of the property interest which Amtrak took from Boston and Maine was "required for intercity rail passenger service." *Id.* at 750. The court also found that the Commission had inadequately responded to Boston and Maine's claim that its ability to perform its common carrier obligations would be substantially impaired by the condemnation. The court reasoned that "the [Commission's] cursory statement that [Boston and Maine's] ability to carry out its common carrier obligations will be adequately protected by the terms of a trackage rights agreement dictated by its competitor" did not satisfy section 402(d)(1)(A) of RPSA. *Id.* at 751.

The majority also held that the Commission did not adequately consider whether Amtrak could meet its obligation to provide economical rail passenger service by acquiring alternative property or a lesser property interest, such as an easement for passenger service over Boston and Maine's tracks instead of condemnation of the entire estate. The court found that the Commission's rejection of Boston and Maine's "lesser interest" argument was inadequate because it "rested on the conclusory assertion that Amtrak has demonstrated sufficient reason to justify acquisition of the line." *Id.* Because the Commission's findings utterly failed to address the prerequisites in section 402(d)(1)(A) and (B) to the issuance of a valid condemnation order, the majority concluded that "the Commission's conclusory assertions fail the requirement of reasoned decisionmaking" and set aside the Commission's order. *Id.* Judge Ruth B. Ginsburg concurred in the majority's assessment of the Commission's fact-finding, concluding that "the ICC shirked its obligation in this case to monitor closely Amtrak's

exercise of the broad eminent domain power conferred by section 402(d) of the RPSA." *Id.* at 755.

Petitioners sought rehearing from the court of appeals and while the petition was pending, Congress enacted the Independent Safety Board Act Amendments of 1990. Pub. L. No. 101-641, 104 Stat. 4654 ("1990 Amendment"). Section 9(a) of the 1990 Amendment provides that in the case of a condemnation under Section 402(d)(1) of RPSA, Amtrak may subsequently convey title or other interest in the property condemned to a third party, if such reconveyance is found by the Commission to further the purposes of the RPSA. 104 Stat. at 4658. The 1990 Amendment was brought to the attention of the court of appeals which, after consideration, denied rehearing in a *per curiam* opinion. *Boston and Maine Corp. v. Interstate Commerce Commission*, Nos. 88-1631 *et al.*, Order (D.C. Cir. Feb. 1, 1991) (App. 1a-4a).

In its Order denying rehearing, the court held that the 1990 Amendment "does not affect the requirement that the property that is subsequently conveyed may not be condemned in the first place if it is not 'required for intercity rail passenger service.' " *Id.*, Order at 3. The court had originally voided Amtrak's reconveyance of Boston and Maine's rail lines to Central Vermont not only because it found no express congressional authorization for that transaction but also because the Commission did not support with adequate findings of fact its approval of the initial condemnation of Boston and Maine's property. In considering the 1990 Amendment, the court stated that, while the new language plainly authorizes Amtrak to convey property *subsequent* to a condemnation that is otherwise valid under RPSA Section 402(d)(1), it does

not affect the requirement under the statute that Amtrak's use of its eminent domain power must be justified in the first instance. *Id.*

ARGUMENT

Petitioners assert that the court below failed to follow what they claim to be the clear legislative intent expressed in the 1990 Amendment. Petitioners also contend that the court below improperly rejected the Commission's interpretation of RPSA and that there exists a conflict with a decision of the Second Circuit. However, the 1990 Amendment does not affect the court of appeals' central determinations that the Commission misconstrued RPSA and that its proceedings were otherwise flawed by the absence of adequate fact finding to support reasoned decisionmaking; nor is there a conflict among the circuits that calls for this Court's review.

1. The court below held that section 402 of RPSA created parallel procedures by which Amtrak can secure the services, facilities and properties it requires at reasonable costs. Section 402(a) sets forth the procedure which applies when Amtrak wishes to contract for the use of a railroad's services, tracks and other facilities; the other procedure, contained in Section 402(d), applies when Amtrak needs to acquire a railroad's property through condemnation proceedings. 911 F.2d at 752. The court below found that the unambiguous meaning of the statute required the Commission to consider and make appropriate findings regarding the various options available under Section 402 of RPSA before allowing Amtrak to condemn the line, particularly in light of the availability of lesser interests which might serve Amtrak's needs,

consonant with the statutory framework. *Id.* at 753. Although Judge Ginsburg did not concur in the panel's construction of RPSA, she concurred in the panel's remand order because the Commission "had made no independent effort to ascertain whether the [Boston and Maine-Central Vermont] conveyance was in fact required to meet Amtrak's passenger service obligations." *Id.* at 755.

Moreover, the court below cannot be faulted for its interpretation of the 1990 Amendment which authorizes Amtrak, after a valid condemnation of another railroad's property under RPSA Section 402(d)(1), to "subsequently convey title or other interest in such property to a third party. . . . " 104 Stat. at 4658. In denying the petition for rehearing, the court below correctly observed that while the new statute "plainly authorizes Amtrak to convey property *subsequent to* a condemnation that is otherwise valid under Section 402(d)(1)," Section 402 still precludes Amtrak from resorting to its condemnation power to effect an outright change in ownership between competing railroads if it could instead achieve the objective necessary for passenger service by taking a lesser interest or by using its Section 402(a) power. *Boston & Maine Corp.*, Order (denying rehearing) at 3 (App. 3a) (emphasis in original). The court below also noted in denying rehearing that it had concluded that the Commission had not made adequate findings under Section 402(d)(1) and, therefore, had not properly determined that the condemnation of the Boston and Maine line was required for Amtrak's services. *Id.* In a separate statement, Judge Ginsburg adhered to her view expressed in the concurring opinion that, despite the 1990 Amendment, the "Commission *itself*" had

not yet made proper findings required under RPSA. *Id.*, Order at 4 (App. 4a) (separate statement of Ginsburg, J.) (emphasis in original). Because the 1990 Amendment does not deal with the core rulings of the court below, and in light of the remand for further proceedings by the Commission, there is no warrant for review by this Court.

2. Petitioners also contend that the court below failed to follow this Court's decision in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984) by deferring to the Commission's construction of RPSA Section 402(d). This argument mischaracterizes the decision of the court below which was unanimous in holding that the Commission failed to make adequate findings in support of its Order under RPSA Section 402(d). Nor does the enactment of the 1990 Amendment add any force to petitioners' contention. Apart from the plain language of the statute, which concerns only reconveyances following a valid condemnation, the 1990 Amendment contains no expression of legislative intent. That amendment, introduced and passed on the last full day of the 101st Congress, without floor debate, committee hearings or committee reports, does not address the procedures, requirements, or interplay of provisions contained in Section 402 of RPSA. Moreover, the court below noted, "[t]he Commission did concede that the use of the Section 402(d) proceeding [in this case] was extraordinary—the first time, in fact, that it has ever been used." 911 F.2d at 749. In light of the failure of the Commission to engage in the fact findings which the court below unanimously found were required by RPSA, there is no basis under *Chevron* to justify further review by

this Court. Indeed, the interlocutory nature of the court of appeals' remand order renders this case not yet ripe for review. *Brotherhood of Locomotive Firemen v. Bangor & Aroostook R. Co.*, 389 U.S. 327, 328 (1967).

3. This case presents no conflict with *National Railroad Passenger Corp. v. Two Parcels of Land*, 822 F.2d 1261 (2d Cir.), *cert. denied*, 484 U.S. 954 (1987). *Two Parcels* involved the condemnation of non-railroad property held by a private party, under Section 305(d)(1)(B) of RPSA. 45 U.S.C. § 545(d)(1)(B)(1988). As the court below pointed out, Section 402 of RPSA governs Amtrak's authority to secure the use of tracks and other rail facilities owned or operated by other railroads. The interplay between subsections (a) and (d) of Section 402 reveal congressional concern about competition in the rail industry and, in particular, cross-subsidization of Amtrak's rail passenger service by the nation's other railroads. *Boston and Maine Corp.*, 911 F.2d at 752-53; Order (denying rehearing) at 2 (App. 2a). The policy issues involved in a transfer between competing railroads of a line in which Amtrak already has trackage rights are not germane to Section 305. Moreover, in *Two Parcels*, the adequacy of the Commission's findings in support of Amtrak's condemnation was not challenged and, therefore, was not evaluated by the court of appeals. In contrast, the adequacy of the Commission's findings on the need for Amtrak's condemnation is central to the court of appeals' decision in this case and thus there is no conflict justifying review by this Court.

4. Finally, the State of Vermont ("Vermont") and Windsor Minerals Inc. ("Windsor") filed briefs in support of the petition. Windsor's factual assertions are,

of course, more properly directed to the proceedings on remand to the Commission. The burden of Vermont's argument is its contention that the court below "stripped Amtrak of its leverage in negotiating with railroads" over use of their lines. (Vermont Br. 6). But Amtrak's "leverage" can only be exercised within the statutory framework which calls for particularized findings by the Commission. The court below was unanimous in holding that the Commission failed to make adequate findings to support a condemnation under Section 402(d) of RPSA and nothing in the 1990 Amendment, which deals only with Amtrak's authority to convey property, with Commission approval, subsequent to a condemnation proceeding, affects that holding.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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